UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM GALICIA, on Behalf of Himself and All Others Similarly Situated,

Plaintiffs,

v.

Civil No. 16-cv-6738 CBA-PK

ICE CREAM HOUSE ON BEDFORD AVE LLC, ICE CREAM HOUSE, LLC, ICE CREAM HOUSE ON AVE M LLC, ICE CREAM HOUSE ON 36TH STREET LLC, REAL KOSHER ICE CREAM INC., DANIEL KLEIN, DAVID KLEIN, AND AVIGDOR KLEIN,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AS AGAINST DEFENDANT REAL KOSHER ICE CREAM, INC.

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PRELIMINARY STATEMENT

Defendant Real Kosher Ice Cream Inc. ("RKIC") respectfully submits this memorandum of law in support of its motion to dismiss pursuant to Rule 12(b)(6). As set forth below, the Second Amended Complaint is utterly bereft of well-pleaded, non-conclusory allegations of fact that might raise Plaintiff's purported entitlement to relief against RKIC above a merely speculative level. Plaintiff's claims against RKIC should therefore be dismissed with prejudice.

STATEMENT OF FACTS

I. Procedural History

Plaintiff commenced this action with the filing of his initial putative class and collective action Complaint on December 6, 2016 (ECF #1). The initial Complaint asserted claims arising under the FLSA and New York Labor Law ("NYLL") against five Defendants, including two corporate entities (Ice Cream House on Bedford Ave LLC; and Ice Cream House LLC), as well as three individuals (Daniel Klein; David Klein; and Victor Klein).

After Defendants filed their Answer to the initial Complaint, Plaintiff filed a First Amended Complaint ("FAC") on April 25, 2017 (*see* ECF #25-9, #27, #29). The FAC asserted identical claims against the initial Defendants, as well as against four newly named Defendant entities, including: The Ice Cream House, LLC; Ice Cream House on Ave M LLC; Ice Cream House On 36th Street LLC; and Real Kosher Ice Cream, Inc. ("RKIC"). Plaintiff also filed a motion for conditional certification of a collective action comprising all hourly employees of each of the named Defendants (ECF #25).

Defendant RKIC filed a pre-motion conference request in anticipation of a Rule 12(b)(6) motion to dismiss on May 18, 2017 (ECF #36). The remaining Defendants filed an Answer to the FAC on the same date (ECF #37). During a pre-motion conference before Magistrate Judge Kuo on June 1, 2017, the Court granted Plaintiff leave to file a Second Amended Complaint ("SAC") to potentially cure the grounds for dismissal that RKIC had raised as to the FAC. Plaintiff thereafter filed an SAC on June 22 (ECF #40). As set forth below, however, the SAC again fails to adequately plead an employment relationship with RKIC or a "single-employer" relationship among RKIC and the other Defendants. Plaintiff's claims as against RKIC should therefore be dismissed with prejudice.

II. Allegations of the Second Amended Complaint

In an apparent reference to Defendant Ice Cream House on Bedford Ave LLC, Plaintiff alleges that he was employed as a "Retail Employee" at an "Ice Cream House" location at 837 Bedford Ave, Brooklyn New York (*see* SAC ¶ 23). Plaintiff also alleges that he worked at "the 2 Church Avenue, Brooklyn Location" (*id.* ¶ 21), which Plaintiff associates with Defendant Ice Cream House, LLC (*id.* ¶ 1) and identifies as an "Ice Cream House Manufacturing Plant" (*id.* ¶ 53). Plaintiff sets forth his weekly work schedules during his employment at the two locations – totaling in excess of 40 hours per week – and alleges that he was paid at his standard hourly rate (rather than at overtime premium rates) for all hours worked, including hours in excess of 40 per week (*see id.* ¶¶ 188-190, 197).

The SAC utterly fails, however, to allege facts demonstrating that Defendant RKIC can plausibly be linked together as Plaintiff's "employer" in combination the two entity Defendants for whom Plaintiff alleges to have worked (*viz.*, Defendants Ice Cream House on Bedford Ave LLC; and Defendant Ice Cream House, LLC). Instead, Plaintiff alleges, in a conclusory fashion, that each of the three individual Defendants are officers, directors, and/or shareholders of RKIC and the two entity Defendants for whom he worked (*see, e.g.*, *id.* ¶ 40). Plaintiff also alleges that the "logo" of RKIC, an ice-cream manufacturer and wholesaler, appears on the website and in the store locations of the two entity Defendants for which Plaintiff worked as a retail employee selling ice cream products manufactured by RKIC (*see id.* ¶¶ 4-6, 8). Finally, Plaintiff alleges that when he was "paid by check," RKIC "was one of the entities that appeared on the paystubs" (*id.* ¶ 88).

Significantly, the SAC is otherwise devoid of any non-conclusory allegations concerning RKIC's status as an alleged joint or single employer of Plaintiff or any other employees of the other Defendants. Thus, Plaintiff does not allege – except in an entirely conclusory fashion – that any employee or agent of RKIC actually hired him, established his rate of pay or compensation structure, exercised control or supervision over his work, or had any direct or indirect interaction with him in connection with any aspect of his employment whatsoever. Rather, Plaintiff's non-conclusory allegations plausibly demonstrate – at most – that Plaintiff: (i) worked at two Defendant retail-entities that sold ice cream products manufactured by RKIC; and (ii) that those two entities and RKIC are partially owned by certain of the same individuals. As set forth below, these allegations are insufficient to state a plausible claim for relief against RKIC, and Defendants' motion to dismiss should be granted.

ARGUMENT

I. Standard of Review

A complaint cannot survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) unless it "contain[s] sufficient factual matter" to state a claim for relief that is "'plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Supreme Court has counseled district courts to employ a two-step analysis in evaluating the sufficiency of a proposed amended claim. First, the court must "identify[ ] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 550 U.S. at 679. Thus, the court should accept as true any well-pleaded factual allegations, but reject legal conclusions unsupported by facts. *See id*. at 679. Next, the court should "determine whether [the well-pleaded factual allegations] plausibly give rise to an entitlement to relief." *Id*. at 679. This plausibility standard requires more of a showing than "a sheer possibility that the defendant has acted unlawfully," but rather, that the factual allegations give rise to a reasonable inference that the defendant is liable for the misconduct alleged. *Id*. at 678. Where this analysis does not "permit the court to infer more than the mere possibility of misconduct, the complaint has not "'show[n]'—'that the pleader is entitled to relief,'" *id*. at 679 (citing Fed. R. Civ. P. 8(a)(2)), and therefore must be dismissed.

II. The SAC Fails to State a Claim Against RKIC As Plaintiff's Purported Employer

The FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d); *see also Cannon v. Douglas Elliman, LLC*, No. 06-cv-7092 (NRB), 2007 WL 4358456, at *4 (S.D.N.Y. Dec. 10, 2007) (citing cases) (stating that the FLSA and NYLL employ near identical standards with respect to employment status). "To determine whether an entity or an individual is an 'employer' under the FLSA, courts look to the 'economic reality' of the employment relationship." *Wolman v. Catholic Health Sys. of Long Island, Inc*., 853 F. Supp. 2d 290, 297 (E.D.N.Y. 2012), *aff'd in part and rev'd in part on other grounds sub nom*., *Lundy v. Catholic Health Sys. of Long Island Inc*., 711 F.3d 106 (2d Cir. 2013). First, courts "examine the degree of formal control exercised over a worker," *Barfield v. New York City Health and Hosp. Corp*., 537 F.3d 132, 143 (2d Cir. 2008).[1] "If a court finds that a putative employer does not exercise formal control over a worker,

[1] *See generally Carter v. Dutchess Cmty. Coll*., 735 F.2d 8, 12 (2d Cir. 1984) (presenting a non-exhaustive list of factors assessing whether the alleged employer "(1) had the power to hire and fire the

it must then assess whether the entity nevertheless exercised functional control over a worker." *Wolman*, 853 F. Supp. 2d at 297.[2]

In cases like this one, in which multiple entities are named as defendants, however, more information is required to show that a plaintiff is in fact an employee of a defendant. *See Diaz v. Consortium for Worker Educ. Inc.*, No. 10-cv-01848, 2010 WL 3910280, at *4 (S.D.N.Y. Sept. 28, 2010) (complaint against multiple corporate defendants "contain[ed] no facts that indicate that [defendant] had any direct role in managing the plaintiffs, hiring or firing the plaintiffs, determining their working hours, or maintaining employment records."); *Sampson v. MediSys Health Network, Inc.,* No. 10-cv-1342 (SJF)(ARL), 2012 WL 3027838, at *11 (E.D.N.Y. July 24, 2012) (stating that the court need not accept conclusory allegations that plaintiffs were employed by "defendants"). "[M]ere boilerplate allegations that an individual meets the various prongs of the economic reality test . . . without any supporting details" are insufficient, because such allegations fail to raise the plaintiffs' right to relief "above a speculative level." *N.Y. State Court Clerks Ass'n*, 25 F. Supp. 3d 459, 471 (S.D.N.Y. 2014); *Bravo v. Established Burger One LLC*, No. 12-cv-9044 (CM), 2013 WL 5549495, at *7 (S.D.N.Y. Oct. 8, 2013) (dismissing claims that alleged "no specific facts" regarding defendants' employer status, "aside from the elements of the 'economic reality test'").

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employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records").

[2] *See generally Barfield*, 537 F.3d at 143 (presenting a non-exhaustive list of factors assessing whether "the alleged employer's premises and equipment were used for the [p]laintiffs' work; (2) whether [p]laintiffs shifted from one putative joint employer's premises to that of another; (3) the extent to which the work performed by [p]laintiffs was integral to the overall business operation; (4) whether [p]laintiffs' work responsibilities remained the same regardless of where they worked; (5) the degree to which the alleged employer or its agents supervised [p]laintiffs' work, and (6) whether [p]laintiffs worked exclusively or predominantly for one [d]efendant").

Rather, the central issue remains the same: whether Defendants exercised sufficient control over Plaintiff to be considered single employers under the FLSA. *Wolman*, 2012 WL 566255, at *5 ("Plaintiffs' assertions that Defendants are an 'integrated enterprise', 'have common ownership', and are 'engage[d] in a joint venture' are similarly insufficient" to show that defendants were plaintiffs' employers); *Peng Bai v. Fu Xing Zhuo*, No. 13-cv-05790 (ILG)(SMG), 2014 WL 2645119, at *4 (E.D.N.Y. June 13, 2014) (holding that "allegations that [defendant] had the power to hire, fire, set wages, set work conditions, and maintain employment records" were "conclusory and inadequate to establish that [defendant] was an employer").

Here, Plaintiff has offered virtually nothing beyond a conclusory, boilerplate recitation of the elements to support his characterization of RKIC as an employer of *any* Plaintiff or purported similarly situated employee under the economic reality and/or "single employer" tests. At most, Plaintiff merely alleges that the two entity Defendants who purportedly failed to provide him with all compensation required under the FLSA and NYLL: (i) sell ice cream products manufactured by RKIC; and (ii) share partially overlapping corporate ownership with RKIC. These two allegations, however — even if assumed to be true, as the Court must for purposes of this motion to dismiss — utterly fail to plausibly indicate that RKIC had any role in managing Plaintiff, hiring or firing Plaintiff, determining his work hours, or maintaining his employment records. *See Diaz*, 2010 WL 3910280, at *4. Indeed, the SAC is utterly devoid of any well-pleaded, non-conclusory allegation suggesting that RKIC had any formal or functional control over Plaintiff's employment in any respect whatsoever.

The glaring absence of such factual allegations is undiminished by the SAC's invocation of bald legal conclusions (untethered from animating facts) as to RKIC's purported satisfaction of the elements of the economic realities test.[3] Such conclusions — although couched as allegations of fact and repeated with methodical precision throughout the lengthy SAC — do nothing to nudge Plaintiff's claims as against RKIC into the realm of the "plausible" for purposes of Rules 8 and 12(b)(6). *See, e.g., Peng Bai*, 2014 WL 2645119, at *4; *Wolman*, 2012 WL 566255, at *5; *Bravo*, 2013 WL 5549495, at *7.

Plaintiff's Second Amended Complaint should therefore be dismissed as against Defendant RKIC for failure to state a claim under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss all claims asserted in this action as against RKIC with prejudice pursuant to Rule 12(b)(6).

Dated: June 13, 2017
New York, New York

Respectfully submitted,

By: ______________________
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[3] *See, e.g.,* SAC ¶ 3, ¶¶ 29-30, ¶¶ 36-41, ¶¶ 89-91, ¶¶ 101-118, ¶¶ 132-139, ¶¶ 153-160, ¶¶ 166-174.